otherwise adversely affect his status an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964,
42 U. S. Code §2000e-3. Other Unlawful Employment Practices.
(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The by-laws of the hospital provide in relevant part:
"The Board of Managers shall appoint, under terms prescribed by the Board, a general manager to be known as the Administrator of the hospital district. .... The Administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the district and have general direction of the affairs of the district, within such limitations as may be prescribed by the Board. ... He shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal." The By-laws are reproduced in full at Appendix 4 A. Titus Regional Medical Center Board of Managers Bylaws, Article XI - Administrator (adopted, April 2, 1990)

The hospital radiology departmental policy provides in relevant part:

1. The radiologic technologists conducts herself or himself in a professional manner, responds to patient needs and supports colleagues and associates in providing quality patient care.

5. The radiologic technologist assesses situations; exercises care, discretion and judgment; assumes responsibility for professional decisions; and acts in the best interest of the patient.

6. The radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice of the profession. (Adopted March 4, 2002).

The policy is reproduced in full at Appendix 4 B.

STATEMENT OF THE CASE

The District Court had jurisdiction over Plaintiff's claims because the action arose under the First Amendment and the Fourteenth Amendment (Section One) to the United Sates Constitution, for which redress is provided under 42 U.S.C. § 1983, being a Civil Action for Deprivation of Civil Rights; and also, under the United States Civil Rights Act of 1964, ("Title VII") Article 42 U.S.C. § 2000e (2) (3), being a Civil Action for Unlawful Employment Practices. Jurisdiction was conferred on the District Court under 28 U.S.C. § 1343 (a) (3) because Plaintiff's claims are civil actions authorized by law and federal question jurisdiction is conferred by 28 U.S.C. § 1331 because it is a civil action arising under the laws and Constitution of the United States. (3rd Am Pet)

Roberts was a CAT scan technologist in the radiology department of Titus County Memorial Hospital from 1986 to 2002 when she was terminated under the allegations of "soliciting employees and diagnosing patients' problems and giving medical advice". (App.

5 A). Roberts claims she was wrongfully fired and has substantive due process rights and may only be fired "for good cause" as stated in the hospital's organizational By-laws promulgated by the governing Board of Managers and accordingly, denied procedural due process with constitutionally adequate procedures. The issue of due process rest in whether the Hospital By-laws, a local provision with the force of law, prevail over the general presumption that Petitioner Roberts is an "at will" employee.

The Hospital challenged Roberts' due process claims without evidence, but contended the By-laws did not alter her "at will" status or entitle her to due process rights, accordingly the District Court found the "By-laws could not alter Plaintiff's employment status as and "at will" employee without reference to the By-laws in an employment contract." (App. 2 at 22). The Court of Appeals found the "By-laws could not alter Plaintiff's employment." (App. 1 at 4). Both Courts below cited as cases of authority, those relating to internal policies and not law; accordingly, the court is in conflict with *Legal Services Corp. v. Velazques, et. al.*, U. S. No. 99-603 (Feb. 2001) that "Judicial decisions do not stand as binding precedent for points were not raised, not argued, and hence not analyzed."?

March 5, 2002, the hospital officially announced to Roberts a newly adopted departmental policy in a documented counsel threatening termination, in relevant part, specifically known as Code #6. (App. 4 B). Hospital allegations against Petitioner are general in nature and do not disclose specific testimony upon which the charges rest, but state Roberts' speech violated Code #6, in that the "giving your opinion of CT scans to physician" and discussions of findings with physicians was out of her "scope of practice", as well as "discussing and/or advising a pt. regarding treatment". (App. 5 C). Petitioner requested specifics of these vague charges to no avail (App. 5 D). Upon termination, general conclusory allegations led Roberts to file a facial challenge, claiming Code #6 was a prior restraint that effectively condemned her and all technologist from speaking as a patient advocate and

accordingly infringed on her liberty to associate with colleagues due to the fact it was vague and standardless. (App. 5 X).

The Hospital first challenged Roberts' facial challenge of Code #6 in their Reply to the Response to Defendents Motion for Summary Judgment without evidence and simply contended that Roberts' challenge of Code #6 was not proper against the Hospital, and at oral argument, argued the stated purpose in implementing the policy in conjunction with Roberts' qualifications along with their version of interpretation of what the policy prohibited – specifically, the "interpreting of x-rays or CAT scan results or giving medical diagnoses". (App. 2 at 7).

Accordingly, the District Court found the policy "is not so 'vague or standardless' that is leaves radiologic technologist uncertain as to the conduct it prohibits" and "because people of ordinary intelligence understand that unqualified medical personnel should not interpret x-rays or CAT scan results, diagnose patients, or tell patients not to follow the advice of their doctor," the policy does not authorize or encourage arbitrary and discriminatory enforcement. (App. 2 at 8). The Court of Appeals affirmed the District Court ruling as a matter of law, stating that "diagnosing patients is the realm of physicians." (App. 1 at 5-6).

The issue of Roberts' facial challenge rest in whether the policy (Code #6) must be judged upon its face, rather than the substantiality of the reasons advanced for the policy's purpose, in the absence of testimony of the specific speech supporting the charges against petitioner; accordingly, did the court properly apply the standard of review for a just determination. The interest of the liberty of free discussions and public concerns calls upon this court to utilize its authority and clarify the standard of review for facial challenges to policies in the employment context that are based on general allegations in light of the ruling, "[t]he section in question must be judged upon its face", *Thornhill v. State of Alabama*, 310 U. S. 88, 97 (1940), and "[a] 'reasonable' burden on expression requires a justification far stronger than mere specula-

tion about serious harm", *U. S. v. National Treasury Employees Union*, No. 93-1170 (1995).

The Hospital, neither challenged nor argued Petitioner's alternative First Amendment claims with any evidence of the specific speech (general charges were alleged) for which Petitioner was fired, neither did the Hospital challenge with any evidence nor argue facts of an investigation prior to Petitioner's firing (App. 5 E). The Hospital stated in response to discovery request, "that Plaintiff is requesting Defendants to prove her lawsuit" when such information was requested. (App. 5 F). The Hospital moved for summary judgment on their characterization – not Petitioner's characterization – of the First Amendment claims. (App. 5 E).

Accordingly, for reasons the Hospital advanced, the District Court ruled in favor of the Hospital upon all Petitioner's claims as the Hospital chose to characterize them and the Court of Appeals affirmed the District Court in all aspects. (App. 1, 2, 5 X).

Relating to the alternative Count One Code #6 public concern disputed speech claim, the Hospital's motion argued, "Plaintiff's speech was a matter of personal opinion and benefit ... also failed to identify specific 'speech' she believed was protected ... any interest Plaintiff may have ... is far outweighed by the hospital's interest in protecting its patients from someone not authorized to make medical diagnoses", while at the same time alleged, despite warnings Petitioner continued with her speech (which was undisclosed) of what was "perceived" as demonstrative of violating the laws of Texas and practicing medicine without a license. (App. 5 E & G). Petitioner's affidavit denies such allegations with the claim she was wrongfully discharged (App. 5 H).

The issue before this Court concerns First Amendment claims governed by the framework of *Waters v. Churchill*, 511 U.S. 661 (1994) (when speech is in dispute) and the application of the Waters' "reasonableness test". Petitioner calls upon the Supreme Court to settle an important question of federal law that has not been, but should be, settled by the Supreme Court in the interest

of the jurisprudence of fundamental constitutional rights. Does the Hospital have the burden to allege specific facts in support of the Hospital's conclusion about what was said before they fired Petitioner Roberts, which are needed to effectuate the "reasonableness test" outlined in *Waters* and allow the proper application of the *Connick* test; and can the Hospital avoid liability when it refuses to come forth with such facts when challenged in court for its actions of terminating Petitioner for her speech with a letter of termination stated in general terms that is disputed? Accordingly, is justice served in a summary judgment proceeding to deny the truth of Petitioner's pleadings and apply the *Connick* test with ungoverned deference to the Hospital's generalized version of the reasons for termination and characterization of Petitioner's claims – standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right?

In the Count One pretext claim for prior whistleblower speech, the Hospital did not challenge with evidence or argue against on the grounds the specific whistleblower speech was not a matter of public concern, but the pretextual grounds were not of public concern, and asserted the affirmative defense Petitioner was fired for another totally different reason, insubordination, with continual violations as charged; allegations Petitioner denied (App. 5 E, H).

The issue in Petitioner's Count One pretext case concerns the application of the *Connick* test – to which speech is the court to apply the *Connick* test? Does the court apply the *Connick* test to prior undisputed speech or does the court apply the *Connick* test to the disputed pretextual reasons as in the case at bar and thus, foreclose a *Pickering* analysis on prior speech, the court had earlier determined was protected?

With reference to Count Two, the Hospital did not challenge with evidence or argue against Petitioner's claim the solicitation policy was dispensed with viewpoint discrimination, but only challenged the Count Two claim concerning statements made in pursuit of the Texas Whistleblower Act claim as being a matter of

personal benefit, the specific speech was not identified, and the Hospital's interest in efficiency outweighed Petitioner's interest. During oral argument, the Hospital did confirm, that summary judgment was sought on all causes of action. (App. 5 I).

In the Count Two claim the solicitation policy was applied against Petitioner with alleged viewpoint discrimination, Petitioner finds argument with the District Courts precedent, without supporting authority, the disputed non-speech element of her protected speech act needed to "rise to the level of a public concern" in the context of this case and the Court assumed the Hospital's state of mind behind its actions when there is arguably no evidence in the record to support the Hospital "acted to preserve the purpose of the Hospital's business ... ". (App. 2 at 17).

The issue in Petitioner's alternative Count Two public concern claim relating to the application of the solicitation policy to statements made pursuant to the Texas Whistleblower claim, the District Court found to be of a public concern, but her solicitation activities were not and were properly manner, time, and place regulated to the extent the activities disrupted the efficiency of the Hospital's goal of treating patients. (App. 2 at 15). The Hospital argued the solicitation was disruptive. (App. 2 at 14). The record is void of supporting testimony of how the verbal act interfered with the efficient function of the duties of any employee in the goal of treating patients, accordingly the issue before the Court, does a *Pickering* analysis of the *potential* for disruptiveness require admissible evidence to support a "clear potential" as in *Connick* and *Waters*? (App. 5 J & K).

Petitioner's Count Four claim is a Title VII hostile work environment claim of disparate treatment rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations (App. 2 at 26; App 5 X). The District Court tried the claim as a failure to promote claim and found Petitioner proffered no evidence of discriminatory motive as it related to the CAT scan "Lead Tech" designation of Petitioner's male co-worker (App. 2 at 29).

The Court of Appeals found, "Because Title VII addresses only "ultimate employment decisions," ... Roberts failed to state a prima facie case because the "lead tech" job did not constitute a new position .... the Hospital put forward valid, nondiscriminatory reasons ... that Roberts is unable to rebut" with competent evidence. (App. 1 at 9).

Petitioner filed a grievance dated 10-12-01, complaining of the denial of the equal opportunity to apply for the Lead Tech and her right as a citizen to speak on political issues related to purchasing a CT scanner. (App. 5 L). The Lead Tech was a designation based subjective criteria. (App. 5 M). The Lead Tech issued memorandum threatening disciplinary action and detailing job duties. (App. 5 N). Petitioner had previously filed a formal sex discrimination grievance dated 8-28-00. (App. 5 O) A grievance response dated 11-14-01 states "among the reason he was assigned these duties were your ... demonstrated lack of respect and of cooperation with management at any level". (App. 5 P).

The issue before the Court, can a hostile work environment claim be one based on disparate treatment spanning years to include evidence of subjective and discretionary promotion systems of statistical disparity that have the functional effect of denying women equal access to employment opportunities; and is the Petitioner entitled to have such a claim determined as such and not solely as a failure to promote claim; and is the Court in conflict with itself that Title VII only addresses ultimate actions.

The District Court found the Count Five Title VII retaliation claim failed because the temporal proximity was too long to create an inference of retaliation and Petitioner failed to show pretext. (App. 2 at 33-34). The Appeals court affirmed. (App. 1 at 10). The issue before the Court is what span of temporal proximity is sufficient at the summary judgment stage to be presumptive of causation, since the Courts are split on this issue and are not state of mind issues supported by circumstantial evidence on pretext for the jury?

ARGUMENT

1. The "By-laws" of a local governmental entity that state, the administrator "may dismiss any employee for good cause and thereafter make a report to the Board of the dismissal", create employment due process rights over the general presumption of an "at will" status?

In *Board of Regents v. Roth*, 408 U. S. 564, 577 (1972), the Court stated property interest are "created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law..." and accordingly Roberts cited as the independent source for her due process rights the hospital organizational By-laws promulgated by the governing Board of Managers. (App. 2 at 21).

A. Both Courts cited an abundance of case law not on point with the case at bar, since the By-laws are not an internal policy that can be equated with an employee manual and are not descriptive of an oral agreement; and the cited cases do not address such a requirement that "an independent source such as state law" must be referenced in an employment contract to alter the "at will" status of an employee; thus, the courts are also, in conflict with *Legal Services Corp. v. Velazquez, et. al.*, U. S. No. 99-603 (Feb. 2001) that "Judicial decisions do not stand as binding "precedent" for points that were not raised, not argued, and hence not analyzed."

B. The By-laws are more than a policy, they are secondary law. The District Court failed to recognize the distinction between a law and a policy. Law is defined as, "Something, such as an order or a dictum, having absolute or unquestioned authority." *The American Heritage College Dictionary*, Houghton Mifflin Co., pg. 785 (4th ed., © 2002). Whereas a policy is defined as "A course of action, guiding principle, or procedure considered expedient, prudent, or advantageous." *AHCD, Id*, pg. 1077.

As argued in Appellant's Motion for Rehearing, the By-laws of the hospital are secondary law, and prevail over a mere

presumption of a general provision (M. R. at 5-6). The Texas Code Construction Act supports such a contention stating, "if a general provision conflicts with a special or local provision..., the special or local provision prevails as an exception to the general provision, unless the general provision is the latter enactment...". Tex. Gov't. Code §311.026(a)(b).

C. The Board of Managers is the governing Board of the Hospital District under the Texas Constitution, Acts 1983, 58th Legislature Chapter 298 §1, (App. 5 B) and has the authority to promulgate rules and regulations for the operation of the hospital or hospital system. (By-laws Art. III Sec. 10 [App. 4 A]). The organizational By-laws of the Hospital, Article XI, states, "The Administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the district and have general direction of the affairs of the district, within such limitations as may be prescribed by the Board. ... He shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal." (App. 4 A)

While the By-laws grant to the administrator permission to terminate or not terminate an employee and apply to the administrator's individual seat of authority – as the Court of Appeals found – the By-laws clearly restrict the application and scope of that authority in a collective manner, equating as law the provision that employees can not be terminated except for "good cause". In Texas, it is presumed the intention of an enactment of law is to be effective with a just and reasonable result. Tex. Govn't Code §311.021 (1985). The Court of Appeals narrowly constricted the By-law without any rational basis for it's reasoning. (App. 1 at 4).

The By-law has a three-fold nature which encompasses more than the individual permission of authority to terminate or there would have been no need for a directive to afford protection against unjust termination and mandate accountability *after* the termination (App.

4A). In a rational basis of review it is only reasonable to conclude there would have been no need to restrict the dimensions of punishment *except* for the protection of the one being punished, and certainly such a restriction would have been of no benefit to the Administrator, contrary to what the Court of Appeals intimates. Furthermore, a job description pertains to a specific individuals qualifications and requirements to qualify for a position, therefore it is not rational to equate a by-law as such when a " bylaw" is defined as, "A law or rule governing the internal affairs of an organization; secondary law." *AHCD Id.* pg. 199. The By-law in question is the law governing termination through the conduit of the definitively defined standards contained in the employee handbook to accord due process (M.R. at 6).

While the "at will" status rest in the authority to be free to fire without restrictions, the "for cause" status rest in the dimensions of authority defined by the law to fire (*See Roth Id,*). By analogy, it would not be *reasonable* for a babysitter to presume they have permission to punish a child when the child has done no wrong, just because the parent gives permission to punish the child if they misbehave.

The Court cites the Texas case, *Sabine Pilot Service v. Hauck*, 687 S.W. 2d 733 (Tex. 1985) as authority governing policies that alter the at-will nature of the employment relationship and states "the policy must specifically and expressly limit the employer's ability to terminate the employee". (App. 2 at 21). The By-laws do just that with its restrictive clause, a dictum, having absolute or unquestioned authority, to terminate "for good cause". (App. 4 A).

2. Must a facial challenge to a local governmental policy in the employment context that is a prior restraint effectively condemning speech as a patient advocate and thereby associations with colleagues be judged upon its face, rather than the substantiality of the reasons advanced for the policy's purpose, in the absence of testimony of the specific speech supporting the charges against petitioner; accordingly, did the court properly apply the standard of review for a just determination?

"Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under, it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill v. State of Alabama*, 310 U. S. 88, 99 (1940); *Stromberg v. California*, 283 U. S. 359, 368 (1931); *Lanzetta v. State of New Jersey*, 306 U. S. 451, 454 (1939) "The section in question must be judged upon its face." *Thornhill v. State of Alabama*, 310 U. S. 88, 97 (1940). "What counts for purposes of vagueness analysis, however, is not what the Ordinance is 'designed to prohibit,' but what it acutually subjects to criminal penalty." *Morales, Id.*

A. Petitioner complains that Code #6 is unconstitutional in that it is a sweeping regulation that is sufficiently vague and standardless or subjective that it could be utilized to engage in viewpoint discrimination penalized by termination for those whose speech is perceived to be as making a diagnosis and practicing medicine without a license, and that she has standing to bring this challenge because the Code #6 policy was applied against her in such a manner by the Hospital. (3rd Am. Pet.). Petitioner argues the policy not only imposes a significant burden on the physician's right to hear what the technologist would otherwise have said, but effectively restricts association out of fear of what might be perceived as being said. (3rd Am. Pet.).

B. The Court of Appeals affirmed the judgment of the District Court as a matter of law and stated two independent reasons a policy may be found vague in that "[a] law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement". *City of Chicago v. Morales*, 527 U. S. 41, 56-57 (1999). However, it only made reference applicable to the first reason. (App. 1 at 5). Even if an indulgent interpretation of the Appeals Court's opinion could be found to have addressed both of the above required reasons, which is arguable, the court failed to cite or apply the standard of review applicable to facial challenges set out by the Supreme Court that

confines the review to the *face of the statute* and not the substantiality of the reasons advanced behind the face. (App.1 at 6) (*Thornhill, Id.; Stromberg, Id.* and *Lanzetta, Id.*) .

The Courts below expressed no intention of narrowing the construction of the statute by prior State decisions. (App. 1 & 2). The Hospital disclosed no specific facts behind the face of the complaint that the court could analyze in conjunction with any associated permissible inferences that would occasion the court to expand the standard of review beyond the face of the policy, even though Petitioner challenges the policy as a sweeping regulation effectively condemning the freedom to speak as a patient advocate with further infringement on association with colleagues. *Thornhill, Id.* at 97. "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it". *Lazetta, Id.* at 454 quoting *United States v. Reese*, 92 U. S. 214, 221 (1875).

C. On appeal, the Hospital advanced the argument, the purpose of the policy was it "simply prohibits technicians from encroaching into the practice of medicine by giving medical diagnosis" and was "provided as a guide for the level of professionalism and conduct the Hospital would accept", along with the fact Petitioner was not a licensed physician. (App. 2 at 7). "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.". *U. S. v. National Treasury Employees Union*, No. 93-1170 (1995). "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women ... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.". *Whitney v. California*, 274 U. S. 357, 376 (1927) (concurring opinion) quoted in *U.S. v. National, Id.*.

D. As argued in Appellant's Brief, in a review limited to the face of the policy, one will find the Code's terms and phrases are nowhere definitively defined and are capable of ambiguous meanings depending on any given context. The policy is also, nonspecific as to an applicable mode of action for violations, to the exclusion of arbitrary interpretation and enforcement, and fails to identify the enforcement authority; therefore, it "fails to establish standards for `the enforcer' that are sufficient to guard against the arbitrary deprivation of liberty." *Morales, Id.*

Specifically, the relevant term diagnosis does not prescribe what shall be orthodox in matters of opinion or ideas expressed, or the context and form of such that would constitute any given speech as a diagnosis, leaving the terms construction to indefinite and discretionary interpretation (App. 4 B). The term cannot be rationally related to the context of the sentence in a definitive manner when it has more than one meaning which may refer to opinions that may not be "susceptible of objective measurement" depending on the context and form expressed. *Cramp v. Bd. of Public Instruction,* 368 U. S. 278, 287 (1961).

One definition of "diagnosis" is "[t]he act or process of determining the nature and cause of a disease or injury through examination of a patient" and another is "[t]he opinion derived from such an examination." *The American Heritage College Dictionary,* Houghton Mifflin Co., pg. 390 (4th ed. © 2002). According to another source it is "The determination of the nature of a case of disease". *Dorland's Illustrated Medical Dictionary,* by W. B. Saunders Company, pg. 461 (27th ed. © 1988). If one looks further at the meaning of "determination", which is defined as "[t]he settling of a question or case by an authoritative decision or pronouncement; the decision or pronouncement made" and to "determine" an issue is "[t]o decide or settle conclusively and authoritatively" or "[t]o limit in scope or extent", then it is reasonable to conclude a diagnosis is authoritatively distinctly separate from any of a number of individual perceptions or opinions communicated as pertinent

information in the best interest of the patient or intended as a critique for the advancement of learning or as a critique of an authoritative judgment for purposes of reporting negligence. *A.H.C.D., Id.* pg. 386. "Words which are vague and fluid ... may be as much a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U. S. 174, 176 (1952).

Neither can it be rationally determined that Code #6 includes CAT scan medical technology in the phrase "the scope of practice" when the scope is not defined and the specific field of CAT scan, a relatively new and rapidly advancing technical field with ever changing job demands and expectations, is not comparable to diagnostic x-ray in the health care setting. If one construes the context of the scope to relate back to the agency relationship as being exclusive of that relationship, then the policy does not sufficiently detail the dimensions and design of the scope of the agency relationship with the permissible limits of outreach in the chain of communication; for example, the agency relationship may include giving informed consent or post examination instructions to patients, or notification to appropriate health providers the need for immediate clinical response based on procedural findings and the patients condition. It is not reasonable to judge communications outside the agency relationship the same as those inside the agency relationship as the Court purports. Code #6 gives no clue as to who qualifies as an enforcement authority or by what standard the policy's fundamental ingredients are determined to be a violation. (App. 4 B).

E. The Court did not judge the policy upon its face, but proceeded to base its judgment on the reasons advanced by the Hospital outside the policy's stated purpose and the vague accusations under it of the Hospital's purported concerns advanced by those who desired to protect a code of silence as evidenced by the Court's reference to the physician's realm, a subject matter the Code does not even address and is irrelevant in the facial challenge (App. 1 at 5). "A 'reasonable' burden on expression requires a justification far

stronger than mere speculation about serious harm." *U. S. v. National Treasury Employees Union*, No. 93-1170 (1995).

A rational basis of review would include harmonization of Code #6 with the entire policy (Code's 1 & 5 specifically), so effect could be given to the stated purpose of the entire Code without contradiction, yet there is no evidence the Court did so analyze; therefore, the Court could not have rationally determined the validity of non-specific statements in relation to Code #6. (App. 1 at 5). As the Court rationalized and Petitioner agrees, a person of ordinary intelligence would understand that the policy prohibits diagnosis – whatever that means exactly – and yet the Court failed to rationalize a person of ordinary intelligence would also, recognize and understand that technologist are not physicians. (App. 1 at 5). The policy does not give sufficient notice when "it permits punishment" of a technician while engaging in a wide array of innocent conduct in the role of agent or as a patient advocate. *Stromberg v. People of State of California*, 283 U. S. 359, 370 (1931).

3. With regard to First Amendment claims governed by *Waters v. Churchill*, 511 U.S. 661 (1994), the Hospital refused to come forth with specific, non-conclusory, information of the alleged speech as the employer thought it to be and facts of a reasonable investigation predating Petitioners firing, stating it would be asking them "to prove [plaintiff's] case"; accordingly, is justice served in a summary judgment proceeding to deny the truth of Petitioner's pleadings and apply the *Connick* test with ungoverned deference to the Hospital's generalized version and characterization of Petitioner's claims – standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right, or does the Hospital have the burden to come forth with facts to effectuate the *Waters* and *Connick* test to negate liability, or some other undefined procedure?

Waters v. Churchill, 511 U.S. 661 (1994), provides the governing framework for procedures which courts must follow in deciding

First Amendment claims where the government is the employer and the speech is in dispute for which Petitioner was fired. *Waters, Id.* In *Waters*, the court determined "[t]he Connick test should be applied to what the government employer reasonably thought was said ... [o]n the other hand, courts must not apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusion." In reference to the courts opinion, Justice Souter pointed out, "[t]he reasonableness test it sets out is clearly the one that lower courts should apply." *Waters, Id.*

A. In *Foley v. University of Houston System, et al*, 324 F. 3d. 310 (5th Cir. 2003) the Court determined and the Hospital argued, the specific speech must be alleged before the court can apply the *Connick* test. (App. 5 Q). Petitioner's affidavit and 3rd. Am. Pet. did allege her version of facts of the specific speech, even though the Hospital contended otherwise. (App. 5 R & X). However, the Hospital did not allege their version of specific speech facts underlying the charges against Petitioner and clearly stated in response to Discovery that to do so was "asking them to prove [Petitioner's] case". (App. 5 A & F). Petitioner denied the general allegations and in the absence of specific underlying testimony supporting the Hospital's charges, the Court never knew the required factual information to which it must apply the *Connick* test mandated in a *Waters* analysis. (App. 5 H & A). Therefore, according to *Waters* and *Foley* the Court's task was insurmountable; even though Petitioner's version of specific facts was clearly not of a personal nature, as the District Court found when it stated in it's conclusion to the opinion, "[t]he Court recognizes that Plaintiff had in mind the best interest of her patients and the Hospital when she attempted to assist patients and doctors", a fact that is irrelevant in a *Waters'* analysis. (App. 2 at 34).

B. In the second part of a *Waters'* analysis, facts of what the Hospital reasonably thought was said before Petitioner's firing are a necessary ingredient in considering the reasonableness of the

Hospital's investigation and conclusion to terminate. *Waters, Id.* Petitioner could not allege facts of any underlying investigation, since such facts were not in the purview of Petitioner's knowledge as she testified she was never asked anything about the charges and was denied any information when she asked. (App. 5 H). Therefore, it is only reasonable to conclude the Hospital should have the burden to come forth with the specific facts of such information and they did not as the record clearly shows. (App. 1, 2, 5 A & E). "A majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech clause.". *Waters, Id.*

C. Even if the Court were to analyze the general subject matter of the Hospital's allegations as argued during oral argument, which stated it was the Hospital's perception Petitioner Roberts' undisclosed speech was an alleged violation of the Code #6 policy equated with violating the laws of Texas and practicing medicine without a license, a person of ordinary intelligence would not surmise such a conclusion to be reasonable in light of the law and Petitioner's well known level of education and authority as a CAT scan technologist. (App. 2 at 34; App. 5 G). Tex. Occ. Code Ann. §151.002 (13) defines Practicing medicine as the following:

(13) "Practicing medicine" means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who:

(A) publicly professes to be a physician or surgeon; or

(B) directly or indirectly charges money or other compensation for those services.

With the Hospital's avoidance in disclosing the specific speech for which Petitioner was fired and their avoidance in challenging the facial challenge to the Code #6 policy with any meaningful resolve to understand how or by what standard Petitioner's speech convicted her of the charges equated as practicing medicine without a license, the Hospital argued the policy did not

regulate her speech, but her right to [speak]. (App. 5 E). It is also, significant the Hospital's summary judgment motion argued with uncertainty, "any interest Plaintiff *may* have had in diagnosing patients". (emphasis added) (App. 5 E).

The Hospital cited as authority and the Courts based its ruling on *Southern Christian Leadership Conference v. Supreme Court of State of La.*, 252 F 3d 781, (5th Cir. 2001). (App. 1 & 2). *Southern Christian* is not controlling in the present context, it is not on point since the law in question limited the right of representation to certain clients and did not prohibit or punish speech based on its content or point of view, and was content neutral. *Southern, Id.* See *Clark. v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) stating that time, place, and manner test is only applicable to speech regulations that are content neutral and restrictions on expression are content neutral if they are "justified without reference to the content of the regulated spech". "[T]he neutrality inquiry does not focus on the motive of the violator". *United States v. Weslin*, 964 F. Supp. 83 (W.D. N.Y. 1997). Code #6 restricts speech based on the content and viewpoint expressed. (App. 4 B). The District Court ruled, "Plaintiff, who is not a licensed physician, had no right to practice medicine by diagnosing patients and provide unsolicited diagnosis to doctors or patients." (App. 2 at 11). Petitioner never claimed a right to do any of those things, nor did those things, much less argue such things. (App. 5 H). Based on Code #5 and common law, she claims a right to speak in the best interest of the patient. (App. 4 B).

"It is, ... the governmental interest at stake, that helps determine whether a restriction on the expression is valid." *Texas v. Johnson*, 491 U. S. 397, 407 (1989). The Hospital's asserted interest being, "protecting its patients from someone not authorized to make medical diagnoses", is simply not implicated on the facts in the record. (App. 5 E). The District Court drew an incorrect conclusion when it stated, "For example, Plaintiff alleges she correctly diagnosed a patient as having a brain tumor when the radiologist missed the diagnosis after examining the patient's CAT scan

results." (App. 3 at 10-11).

The record clearly shows the correct diagnosis was made the following day from an MRI, not from Roberts, and the fact Roberts expressed her concerns the scan was not normal to the attending physician after he told her he received a normal report does not fit the definition of the term "diagnosis", even if taken out of the context of the Code #6 policy (see facial argument above). (App. 5 S at 27-28). Roberts was in a conundrum, if she had kept her mouth shut, as the Court condemned her for not doing, then Roberts would have been in violation of Codes #1 & 5, the patient could have possibly died, all in the Hospital's asserted interest of protecting the patient – or protecting themselves? (App. 4 B). "[T]he purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." *Cornelius v. NAACP Legal Defense, Id.* at 813.

The Hospital cited no supporting authority it's not a matter of pubic concern for a healthcare worker to report negligence or a foreseeable risk of harm based on knowledge learned through training and experience because the particular language used encroaches on the realm of the physician and may be perceived as practicing medicine without a license. The words of Samuel Johnson, English author, critic & lexicographer (1709 - 1784) says it best, "Language is the dress of thought". *AHCD, Id.* at 687. The Hospital has only "posited the existence of the disease sought to be cured" that lies somewhere in someone's undefined thought. *U. S. v. National Treasury Employees Union, Id.*. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U. S. 357, 377 (1927).

D. Accordingly, in a summary judgment proceeding when it is mandated to deny the truth of Petitioner's pleadings to protect the Hospital and the "[t]he Court recognizes that Plaintiff had in mind the best interest of her patients and the Hospital", is the

Court to proceed to the *Pickering* analysis on the Hospital's generalized version and characterization of Petitioner's claims still denying the truth of Petitioner's pleadings - standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right or does Petitioner's version of specific speech earn a place in the balance? (App. 2 at 34)

4. In a freedom of speech pretext claim alleging retaliation for previous undisputed speech, what is the proper application of the *Connick v. Myers*, 461 U.S. 138 (1983) test – to which speech is the court to apply the *Connick* test? Does the court apply the *Connick* test to the prior speech for which Petitioner claims she was fired under the guise of the Code #6 & solicitation policies or is the *Connick* test applied to the disputed pretextual reasons, taken as true, as in the case at bar and thus, foreclose a *Pickering* analysis on the prior speech?

"The Connick test is to be applied to the speech for which [Petitioner] was fired." *Waters v. Churchill*, 511 U.S. 661, 681 (1994). "A public employer violates the Free Speech Clause, that is, ... if the employer invokes the third-party report merely as a pretext to shield disciplinary action taken because of protected speech the employer believed or genuinely suspects that the employee uttered at another time." Justice Souter concurring, *Waters, Id.*

A. Petitioner was a known whistlblower and had filed such a suit in February prior to her firing the following June. (App. 5 H). The District Court found "the content, form and context of statements provided by plaintiff in pursuit of a Texas Whistleblower Act claim can be fairly considered as relating to matters of political, social, or other concern to the community." (App. 2 at 13).

Petitioner's 3rd Amended Petition's pled an alternative Count One claim, claiming termination under the pretext of the Code #6 and solicitation policies "for speaking out on issues of public concern as a private citizen exposing inefficient and ineffective management relating to alleged violations of the competitive bidding

laws in the the purchase of a CAT scan machine when plaintiff called two Titus County Memorial Hospital Board members from her home phone." The District Court determined the whistle-blower speech was a matter of public concern. (App. 2 at 13).

B. The District Court determined Petitioner's retaliation claim "failed to prove the first prong of the Denton analysis", being that "[t]he employee must establish: (1) the speech involves a matter of public concern;"[1] and thus, "[a]ccordingly, the Court need not determine the final two prongs of the analysis ...". (App. 2 at 30-31).

Even though the District Court had already determined the whistleblower speech was a matter of public concern, it also determined Petitioner had not met her burden of establishing her speech was a matter of public concern because the pretextual reasons, taken as true with ungoverned deference toward the Hospital, were not a matter of public concern. (App. 2 at 31). The Court cited no authority that in a pretext case the plaintiff has to prove the pretextual reasons advanced in the letter of firing were a matter of public concern. (App. 1 & 2). Since the Court stopped the analysis after the first step of Roberts' burden, the Hospital's affirmative defense of insubordination was never reached for a determination of the truth of the matter on the facts.

C. The Waters Court considered a reasonable factfinder might conclude prior speech to be the true motivation behind the decision to fire and "then the court will have to determine whether those statements were protected speech, a different matter than the one before us now". *Waters, Id.* Therefore, the Waters Court never mandated the *Connick* test be applied to the employers version of speech in a pretext case for prior speech just because the speech for which Petitioner was fired is in dispute. *Waters, Id.*

Accordingly, when the Courts applied the *Connick* test to the pretext speech, the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court in *Waters v. Churchill*, 511 U.S. 661 (1994).

[1] Denton v. Morgan, 136 F. 3d 1038, 1042 n.2 (5th Cir. 1998) (App. 2 at 30)

5. In a challenge to a solicitation policy applied to Petitioner with alleged viewpoint discrimination in a non-public forum, where it is undisputed the policy was not uniformly enforced, the policy's purpose was not argued or implicated, the incidental restriction was greater than what was essential, and the restriction had the effect of silencing political speech in general; does the Petitioner need to prove the disputed non-speech element of the same speech act is a matter of public concern etcetera, when the Court found the speech element was a matter of public concern, yet cited no authority to support this precedent?

"The existence of reasonable ground for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination. *Cornelius v. NAACP Legal Defense & Ed. Fund,* 473 U. S. 788, 812 (1985).

A. The Hospital did not challenge or argue against Petitioner's claim the solicitation policy was applied to her with viewpoint discrimination, accordingly the policy's purpose was not asserted. (App. 5 E). The Court made an improper assumption on the Hospital's state of mind behind its actions when there is arguably no evidence in the record to implicate the Hospital "acted to preserve the purpose of the Hospital's business of treating patients". During oral argument, the Hospital did confirm, that summary judgment was sought on all causes of action. (App. 5 I).

B. The District Court determined, "Plaintiff statements in pursuit of her Texas Whistlblower Act claims" were of public concern. (App. 2 at 14). However, the District Court ruled Petitioner's claim failed because the disputed non-speech element of her activities did "not rise to the level of a public concern"; the Hospital "acted to preserve the purpose of the Hospital's business in treating patients"; and "Plaintiff was free to contact employees" after employment hours. (App. 2 at 17).

C. The Courts failed to recognize the 4-9-02 solicitation counsel did not state the activity was disruptive to the "business of treat-

ing patients", but it did restrict Petitioner's freedoms greater than what was essential to the business of treating patients when it restricted her personal freedom beyond other employees. (App. 5 T). The solicitation policy did not prohibit solicitation at the Hospital and it was allowed during "break periods, meal times, or other specified periods during the work day when employees are properly not engaged in performing their work tasks." (App. 2 at 16). Any alleged employee complaints, were from undisclosed witnesses, even upon request. (App. 2 at 17). Roberts denied her speech continued. (App. 5 H). In *United States v. O'brien*, 391 U. S. 367, 368-69 (1968) the Court stated the governmental interest of the regulation is sufficiently justified "if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest." However, *Thornhill v. State of Alabama*, 310 U. S. 88, 107 (1940) stands for the principle that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." These circumstances were appropriate. (App. 5 U; App. 2 at 16).

D. Can the very "act" of speaking, alleged to be a violation of the solicitation policy, overcome the speech the Court determined to be a matter of public concern on the argument the disputed action was not a matter of public concern etcetera, in the context of this case and the following: 1) a request for full names, addresses and phone numbers from all possible witnesses is arguably "solicitation" since it does not seek information through influence or persuasion to embrace or support a point of view, when with the intended purpose to fulfill a legal requirement; 2) the solicitation policy was not uniformly enforced, and the Texas Supreme Court[1] has ruled an employer cannot be held liable for the violation of a reasonable policy, "as long as the rule is uniformly enforced"; and 3) the Court cites no authority to support this precedent the speech and disputed non-speech element of the same speech act both need to "rise to the level of a public concern."

[1] *Continental Coffee Products v. Cazarez*, 937 S.W. 2d 444, 451 (Tex. 1996) (App. 5 V)

(App. 2 & 5 U). Also, Petitioner's testimony was not disputed, solicitation was a common practice not enforced, therefore solicitation became a benefit by custom or practice as the Court stated in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, (1993), "[a] public university is under no obligation to provide benefits or facilities to student groups. Once it chooses to do so, however, it may not discriminate among the recipients of those benefits based upon the viewpoint of their speech." (App. 5 E).

E. Petitioner testified the action against her had the effect of silencing political speech in general among employees who did not know what the Whistleblower Act was, since the Act was not posted as required by law. (App. 5 U). It is not reasonable to restrict speech relating to the legal right of an employee who seeks protection from discrimination and the accountability of public officials for the abuse of public trust under the guise of a policy, but not restrict speech relating to paintball fund drives, which is clearly solicitation, under the same policy; nor is it reasonable to conclude one is more disruptive than the other, when in light of the record taken most favorably to Roberts, it was not disruptive. (App. 5 U & T). To do so, silences speech the Court found was a matter of public concern, which goes against the bedrock principle, speech may not be prohibited because "society finds the idea itself offen-sive or disagreeable" and "[w]henever the government suppresses speech in order to avoid endorsing it, the government has suppressed the speech based on its viewpoint." *The Good News Club. v. Milford Central School*, No. 99-2036 (2000).

6. In the *Pickering v. Board of Ed.*, 391 U. S. 563 (1968) analysis is the potential for disruptiveness to the Hospital's efficiency of treating patients to be met by admissible evidence carrying a "clear potential" as in *Connick v. Myers* and *Waters v. Churchill*?

"A 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harm". *United States v. National Treasury Employees Union*, No. 93-1170 (1995).

A. The Court determined Petitioner's statements made in pursuit of her Texas Whistleblower Act Claims (Count Two) were a matter of public concern, but her solicitation activities were not and were properly manner, time, and place regulated to the extent Plaintiff's activities disrupted the efficiency of the Hospital's goal of treating patients. (App. 2). The Hospital's motion in relevant part claimed, Petitioner's interest in soliciting was far outweighed by their interest in promoting hospital efficiency. (App. 5 E). The Hospital argued the solicitation was disruptive, but the record shows a total absence of testimony stating it was disruptive and no supporting testimony of how the speech interfered with the efficient function of the duties of any employee in the treatment of patients, a fact Petitioner denied, which was never controverted. (App. 5 U). For all the reasons argued above in No. 5, the Hospital did not reasonably and legitimately restrict Petitioner's speech.

B. Since the Court relied on *Connick, Id.* and implied the time, manner, and place of the protected speech was disruptive to the efficiency of treating patients an analysis of those factors falls far short of *Connick* or *Waters*. (App. 2) The speech did occur at the Hospital, but so did the paintball solicitation, the Hospital did not prohibit solicitation at the Hospital (App. 2 at 16), Roberts testified to her acts as verbal on an individual basis, the various times she spoke (when she & the other employees were not engaged in work related activities), the various places (out of the way places), this testimony was not disputed (App. 2 & 5 U, W). The Court cited to D. Mot, Ex. 7, at 12 (App. 5 J) and the letter of counsel (App. 5 T) as the only evidence to support the finding, however Petitioner objected (App. R) to this evidence as not probative of any disruption to the goal of treating patients. See *Rankin v. Mcpherson*, 483 U. S. 378, 389-393 (1987) of how this record does not support such a conclusion by the Court. *Connick* and *Waters* both turned on a "clear potential", there is no potential here, to be fully argued in the Brief on the Merits with the Courts permission.

7. In a Title VII claim, is the Petitioner entitled to have the Court determine her prima facie case on the type claim pled, or as in the case at bar, does the Court rule on the type claim as the Hospital characterizes it; and accordingly, can Petitioner's hostile work environment claim be based on disparate treatment rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations and use supporting evidence of subjective and discretionary promotion systems of statistical disparity; and is the Court in conflict with itself that Title VII only addresses ultimate employment actions.

"[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their ... gender ... offends Title VII's broad rule of workplace equality." *Pennsylvania State Police v. Suders*, No. 03-95 (2004); *Harris v. Forkliff Systems Inc.*, 510 U.S. 17, 22 (1993).

A. Petitioner pled a hostile work environment disparate treatment claim, not a failure to promote claim and the Courts ruled on the claim as a failure to promote claim. (App. 2 at 26-27). When the District Court found, "plaintiff proffered no evidence of discriminatory motive", it discounted Roberts identified a specific employment practice that had the effect of denying women equal access to employment opportunities with a statistical disparity that raised an inference of discriminatory intent. (App. 5 X). In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 97 (1988), the Court concluded "that disparate impact analysis may be applied to a subjective or discretionary promotion system". Also, sex discrimination grievances that went without investigation are probative of motive or the Courts would not allow such as an affirmative defense. The Court of Appeals is incorrect that this case fails because "Title VII" addresses only ultimate employment actions (App. 1 at 9). *Green v.. Administrators of the Tulane Educational Fund*, 284 F. 3d 642 (5h Cir. 2002).

With the Courts permission, detailed argument is reserved till the Brief on the Merits.

8. What span of temporal proximity is sufficient to be presumptive of causation in a Title VII retaliation claim, since the Courts are in great conflict on this issue and are not state of mind issues supported by circumstantial evidence on pretext for the jury?

A. Temporal proximity supports a causal connection for an inference of retaliation. *Walsdorf v. Board of Commissioners of East Jefferson Levee Dist.*, 857 F. 2d 1047 (5th Cir. 1988) (stating adverse action within seven months of filing complaint shows inference of retaliation).

B. "Certain scenarios may arise when a material fact cannot be resolved without weighing the credibility of a particular witnessor individual – such as when the defendant's liability turns on an individual's state of mind and the plaintiff has presented circumstantial evidence probative of intent." *Schoonejongen v. Curtis-Wright Corp.*, 143 F. 3d 120 (3rd Cir.1998).

These will be fully argued in the Brief on the Merits with the Courts permission.

CONCLUSION & PRAYER

For the foregoing reasons, Petitioner prays the Court will grant this Petition for Writ of Certiorari request briefs from the parties, set this case for oral argument, and after oral argument, sustain Petitioner's issues presented for review, reverse the judgment of the District Court and remand this case for a trial on the merits pending, a determination that Petitioner's claim is meritorious.

Thank you for you time and attention in this matter.

Respectfully submitted,

Joan Carol Ellis Roberts

Joan Carol Ellis Roberts, Pro se
65 C.R. 1044
Mt. Pleasant, Texas 75455
(903)572-9667

30.

Case No. _____

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOAN ROBERTS

Plaintiff - Appellant - Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital

Defendants- Appellees - Respondent

PROOF OF SERVICE

I, JOAN ROBERTS, do swear or declare that on this date, August 26, 2005, I have served Petitioner's PETITION FOR WRIT OF CERTIORARI, from the United Stated Court of Appeals for the Fifth Circuit, Cause No-04-41101 by certified U. S. Mail, return receipt requested, to Jeffery C. Lewis, attorney in charge for Titus County Memorial Hospital; George Burns, Director of Radiology Titus County Memorial Hospital; Gene Lott, Director of Human Resources, Titus County Memorial Hospital and whose address is 1710 Moores Lane, P. O. Box 5517, Texarkana, Texas, 75505-5517, telephone (903)792-8246.

Joan Carol Ellis Roberts, Pro Se

Joan Carol Ellis Roberts

65 C.R. 1044

Mt. Pleasant, Texas, 75455

(903)572-9667

STATE OF TEXAS §
TITUS COUNTY §

BEFORE ME, THE UNDERSIGNED NOTARY, ON THIS DAY PERSONALLY APPEARED, JOAN CAROL ELLIS ROBERTS, A PERSON WHOSE IDENTITY IS KNOWN TO ME. AFTER I ADMINISTERED AN OATH TO HER, UPON HER OATH, SHE SAID THE ABOVE STATEMENT CONTAINED IN THE PROOF OF SERVICE IS TRUE AND CORRECT AND THE FACTS CONTAINED WITHIN ARE WITHIN HER PERSONAL KNOWLEDGE.

THE UNDERSIGNED NOTARY, ON AUGUST 26, 2005.

Lycledia D Hall

NOTARY PUBLIC, STATE OF TEXAS

LYCLEDIA D. HALL
Notary Public, State of Texas
Commission Expires 8-30-08

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS,
Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL;
GEORGE BURNS, Director of Radiology,
Titus County Memorial Hospital;
GENE LOTT, Director of Human Resources,
Titus County Memorial Hospital

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

Summary Calendar
No. 04-41101

FILED
April 14, 2005
Charles R. Fulbruge III
Clerk

JOAN CAROL ELLIS ROBERTS,
Plaintiff-Appellant,

versus

TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas,
Texarkana Division
No. 5:03-CV-00021-DF

Before JONES, BARKSDALE, and PRADO, Circuit Judges.
PER CURIAM: *

Appellant Joan Roberts ("Roberts") appeals pro se the district court's award of summary judgment to Appellees Titus County Memorial Hospital ("Hospital") and employees of the Hospital, Director of Radiology George Burns, and Director of Human

Resources Gene Lott. The district court wrote a thorough, carefully reasoned opinion and held, inter alia, that Roberts

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

failed to raise a material issue of triable fact on her claims of invasion of her First Amendment and Due Process rights, as well as Roberts's allegations of Title VII violations. We AFFIRM the district court in all respects.

BACKGROUND

The Hospital employed Roberts as a CAT scan technologist in the radiology department from 1986 to 2002. Roberts routinely received high marks for her technological capabilities, but she had a mixed record for interpersonal relationships. Specifically, Roberts had a documented history of undermining doctors' orders and diagnoses of patients, as well as difficulty in arriving to work on time and in getting along with coworkers. In light of her inter personal problems, and the qualifications of another technologist, when the Hospital opened a "lead tech" position, which required the same amount of work and paid the same salary, Roberts did not receive the position.

Roberts's First Amendment claim arises in part out of her disagreement with the Hospital's method for purchasing equipment, and her verbal complaints to two Hospital board members asserting the Hospital's violation of unspecified "competitive bidding" laws. Although the Hospital ultimately purchased the equipment favored by Roberts (who claims no entitlement to participate in this decision making process), Roberts notified Hospital employees she intended to pursue a whistleblower action against the Hospital. After

filing suit, Roberts began soliciting Hospital employees for information concerning this action during working hours in violation of Hospital policy. Roberts received written warnings for soliciting during working hours and for improperly offering medical advice to patients. Failing to heed these warnings, Roberts was terminated. Roberts pursued administrative action with the Equal Employment Opportunity Commission (EEOC) and ultimately filed the instant suit, claiming, inter alia, a violation of her First Amendment rights, her Due Process rights under the Fourteenth Amendment, as well as violations of Title VII.

DISCUSSION

This court reviews the grant of summary judgment de novo, using the same standard as the district court. Urbano v. Continental Airlines, Inc., 138 F. 3d 204, 205 (5th Cir. 1998).

A property right in maintaining employment may not be deprived without due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491 (1985). However, no process is due where no protected property interest exists. Bd. of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1976). As the constitution does not itself create property interests, a plaintiff claiming deprivation of a property right must clearly establish existence of such a right. Bishop v. Wood, 426 U.S. 341, 344-47, 96 S. Ct. 2074, 2076-79 (1972). In

ascertaining the existence of a property interest, we look to state law. Id. at 344, 96 S. Ct. at 2077. Texas courts strongly adhere to the employment at-will doctrine. See, e.g., Sabine Pilot Serv. v. Hauck, 687 S. W. 2d 733, 734 (Tex. 1985). Texas law imposes a strong presumption in favor of at-will employment. Zenor v. El Paso Healthcare Sys., Ltd., 176 F. 3d 847, 862 (5th Cir. 1999); Montgomery County Hosp. Dist. v. Brown, 965 S. W. 2d 501 (Tex. 1998). Where a plaintiff relies on an employment policy, as

opposed to an employment contract, to rebut the presumption of at-will employment, the proffered employment policy must contain explicit contractual terms altering the at-will relationship in a meaningful way (e.g., through an employment contract). Id. Texas courts are reluctant to imply deviation from at-will employment from ambiguous employment policies. Id.

Based on Texas law and the employment policy at issue, the district court rejected Roberts's Due Process claims. Roberts claims no employment contract. Instead, Roberts cites the following provision from the Hospital's bylaws as evidence of a constitutional property interest in her continued employment:

> The Board of Managers shall appoint, under terms prescribed by the Board, a general manager to be known as the Administrator of the hospital district. . . . He shall supervise the work of all employees. . . and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal.

This provision, however, has nothing to do with Roberts's employment. Instead, it discusses the responsibilities of an

entirely different employee at the Hospital, the Hospital Administrator. Roberts was not terminated by the Hospital Administrator, but instead by the Director of Human Resources. The district court correctly found that Roberts lacked a property interest in her continued employment because she failed to demonstrate that she was not an employee at-will, and therefore was not entitled to any process prior to her termination.

Roberts's First Amendment claims are similarly unavailing. She raises two specific claims in this vein: (1) that the Hospital's policy prohibiting her from acting as a "patient advocate"[1] was impermissibly vague and impeded her First Amendment rights; and (2) that the Hospital's anti-solicitation policy violated her First Amendment rights.

A statute, rule, or policy may be deemed impermissibly vague for either of two discrete reasons: It fails to provide people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct it prohibits; or, it authorizes or encourages arbitrary and discriminatory enforcement. See Chicago v. Morales, 527 U.S. 41, 56-57, 119 S. Ct. 1849, 1859 (1999). Roberts contends that Hospital policy preventing her from interpreting x-rays or CAT scan results – i.e., diagnosing patients – constituted an impermissibly vague policy. As a matter of law,

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1 This title is an invention of Roberts. No term or condition of employment vests her with such a title.

as the district court held, this claim is without merit. The Hospital's policy provides an individual of ordinary intelligence fair notice that diagnosing patients is the realm of physicians, and that staff are not to do so. Roberts, a non-physician, radiologic technologist, had sufficient notice to conform her conduct to clear Hospital policy.

Roberts's second First Amendment claim rests on an individual's ability to speak on matters of public concern. Speech addresses a matter of public concern when it is made primarily in the speaker's role as a citizen rather than as an employee addressing solely matters of personal interest. Connick v. Myers, 461 U.S. 138, 148, 103 S. Ct. 1684, 1690-91 (1983). This court has addressed First Amendment implications of policies similar to the instant policy. In Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana, we held that a state supreme court rule prohibiting non-lawyer students from representing certain solicited indigent parties did not prevent speech of any kind. 252 F. 3d 781, 789-90 (5th Cir. 2001). If a court finds that the speech touches upon a matter of public

concern, it must balance the plaintiff's interest in making those statements against "the interest of the State, as an employer, in promoting efficiency of public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1968).

Roberts's practice of providing diagnoses to patients receiving x-rays and CAT scans, as well as giving unsolicited diagnoses to doctors, did not touch on a matter of public concern. The policy existed to protect patients from the unauthorized practice of medicine; to term this a free speech limitation would be a dangerous intrusion by the judiciary on the Hospital's prerogative to render medical services. See Connick, 461 U.S. at 146, 103 S. Ct. at 1690 ("[W]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."). Moreover, we agree with the district court that even if Roberts could demonstrate her speech touched on a matter of public concern, the Pickering balancing test requires ruling in the Hospital's favor. The Hospital was constitutionally justified in regulating the time, place, and manner of Roberts's speech where Roberts was in no way qualified to provide diagnoses.

As to Roberts's First Amendment claim concerning the Hospital's anti-solicitation policy, we agree with the district court that her speech in this area was arguably a matter of public concern. The goal of the Texas Whistleblower Act is to enhance openness and protect those informing officials of government wrongdoing. See TEX. GOV'T CODE ANN. § 554.002 (a) (VERNON SUPP. 2004).

Nevertheless, under the Pickering balancing test, Roberts cannot prevail on these claims. Although Roberts had a right to make inquiries and statements about possible violations of state law and policy, the Hospital had a concomitant right to prevent such solicitations during working hours in the workplace. Roberts could have done her fact finding outside the Hospital on her own time; the anti-solicitation policy represents a valid time, place, and manner restriction. Cf. Connick, 461 U.S. at 148-53, 103 S. Ct. at 1691-93 (holding that termination of a public employee who distributed questionnaire did not violate the First Amendment, as most of the questions related to inter-office policies and the conduct threatened the agency's institutional efficiency). For these reasons, the district court properly awarded Appellees summary judgment on all of Roberts's First Amendment claims.

In considering a Title VII claim, unless direct evidence of discrimination exists, a court must utilize the three-step analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-25 (1973). Under this formula, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff makes a prima facie case, the employer can rebut the claim by offering a legitimate, non-discriminatory reason for the employment decision. Bodenheimer v. PPG Industries, Inc., 5 F. 3d 955, 957 (5th Cir. 1993). If the defendant succeeds, the court moves to the third step of the

analysis, where the plaintiff bears the burden to prove that the reasons offered by the defendant are pretextual. Id.

Additionally, a plaintiff may establish a Title VII violation by demonstrating a hostile work environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23, 114 S. Ct. 367, 371 (1993). A prima facie case of a hostile work environment is achieved by producing evidence that (1) she belongs to a protected group; (2) she experienced unwelcome sexual harassment; (3) the harassment